



Qwest

607 14th Street, NW, Suite 950
Washington, DC 20005
Phone 202-429-3120
Facsimile 202-293-0561

Melissa E. Newman

Vice President – Federal Regulatory

EX PARTE

FILED VIA ECFS

September 27, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW B-204
445 12th Street, S.W.
Washington, DC 20554

RE: *In the Matter of SBC Communications Inc. and AT&T Corp. Applications
for Approval of Transfer of Control, WC Docket No. 05-65, DA 05-656*

Dear Ms. Dortch:

On September 27, 2005, Qwest presented the attached letter from R. Steven Davis to the Kevin J. Martin, Chairman, Federal Communications Commission. Copies were also distributed to the other commissioners as noted in the letter. Attached to Mr. Davis's letter was a copy of Qwest's confidential ex parte of September 22, 2005. Both the confidential and redacted versions of the September 22, 2005 ex parte have previously been included on the record in the above-captioned proceeding. As such, the attached letter of Mr. Davis does not refile with the Secretary's office the confidential September 22, 2005 ex parte which was submitted today to the Chairman and the other commissioners. Qwest respectfully requests that the attached letter of Mr. R. Steven Davis be included on the record in the above-captioned proceeding.

Pursuant to 47 C.F.R. § 1.49(f), this ex parte submission is being filed via the Commission's Electronic Comment Filing System pursuant to 47 C.F.R. § 1.1206(b)(1). If you have any questions concerning this submission please contact me on 202-429-3120.

Sincerely,

/s/ Melissa E. Newman

Enclosure

Ms. Marlene H. Dortch
September 27, 2005

Page 2 of 2

Copy to:

Michelle Carey (Michelle.Carey@fcc.gov)
Russ Hanser (Russ.Hanser@fcc.gov)
Scott Bergmann (Scott.Bergmann@fcc.gov)
Jessica Rosenworcel (Jessica.Rosenworcel@fcc.gov)
Thomas Navin (Thomas.Navin@fcc.gov)
William Dever (William.Dever@fcc.gov)
Terri Natoli (Terri.Natoli@fcc.gov)
Donald Stockdale (Donald.Stockdale@fcc.gov)
Gail Cohen (Gail.Cohen@fcc.gov)
Marcus Maher (Marcus.Maher@fcc.gov)
Gary Remondino (Gary.Remondino@fcc.gov)
Jeff Tobias (Jeff.Tobias@fcc.gov)
Mary Shultz (Mary.Shultz@fcc.gov)
David Krech (David.Krech@fcc.gov)
JoAnn Lucani (JoAnn.Lucanik@fcc.gov)
Charles Iseman (Charles.Iseman@fcc.gov)
James Bird (James.Bird@fcc.gov)
Jonathan Levy (Jonathan.Levy@fcc.gov)
Gail Cohen (Gail.Cohen@fcc.gov)
Best Copy and Printing, Inc. (FCC@bcpiweb.com)



Qwest
1801 California Street, Suite 4700
Denver, Colorado 80202
Phone 303 896-4200
Facsimile 303 244-0958
PCS 720-203-4200

R. Steven Davis
Senior Vice President
Public Policy

EX PARTE

September 27, 2005

Kevin J. Martin, Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

RE: *SBC/AT&T Applications for Approval of Transfer of Control –
WC Docket No. 05-65*

Dear Chairman Martin:

Qwest is writing to bring to your attention actions that SBC already is taking to secure the anticompetitive advantages it expects to capture through the elimination of its primary rival. Qwest has described this problem in the attached letter, which was filed with the Commission last week.

Qwest recognizes that its participation in this docket may be surprising to some. It is not Qwest's practice to oppose mergers. Where we have disagreements, we prefer to address them directly with the other party, and not through regulatory processes.

However, this is not an ordinary merger – it is unprecedented in both size and effect on competitive markets. AT&T is the largest local and long distance network operator and service provider in the SBC region other than SBC itself. AT&T's substantial customer portfolio and its control of large amounts of telecommunications traffic give it unique abilities to challenge SBC's dominance. This is not a matter of a few buildings here and a few routes there. Today AT&T offers services to wholesale and retail customers throughout broad portions of SBC's region. And AT&T's economies of scope and scale make it the firm best situated to overbuild SBC in additional locations and increase competition in the future.

Not content with eliminating its leading existing rival, SBC is already taking steps to ensure that no other company or group of companies can come forward in the future to replace AT&T's competitive presence. For example, even before its acquisition of AT&T is complete, SBC has begun: (1) imposing severe and arbitrary limits on special access purchasers' ability to "groom" circuits to more efficient configurations or to competitive special access providers; (2) restricting special access customers' ability to utilize high-capacity UNEs for which the Commission continues to require unbundling due to competitive "impairment;" and

(3) prohibiting companies with which it does business from considering mergers with prospective SBC/AT&T competitors.

These actions are not only anticompetitive and unlawful standing alone; they also directly relate to the proposed merger. First, SBC's proposed elimination of AT&T simultaneously eliminates the market constraints imposed by an independent AT&T over SBC's power to raise the costs of its rivals. This will directly increase the cost of retail and wholesale communications where special access is a necessary input.

Second, SBC is exercising that new market power to reduce the competitive significance of any single CLEC by restricting its market opportunity as a potential replacement of AT&T. By unilaterally restricting the ability of special access customers to move traffic off the SBC network, SBC has left CLECs with little chance of developing the economies of scale and scope enjoyed by AT&T today. Instead, the CLECs' potential wholesale customer base is narrowly limited, and their ability to cost-justify new facilities investment to compete with SBC is choked off. This in turn further insulates the increased market power SBC is acquiring by the elimination of AT&T.

Third, SBC also is using its new market power to ensure that, once it has completed its own merger transaction, CLECs will face new barriers to engaging in their own combinations that might improve efficiency and scale economies to replace AT&T's competitive position. In other words, CLECs not only will have fewer potential competitive opportunities individually to increase revenue (because customers are tied to SBC special access). SBC also is trying to limit the CLECs' opportunity to reduce costs through the kind of merger synergies SBC presumably intends to capture through elimination of overlapping AT&T operations.

These anticompetitive actions underscore why the SBC/AT&T merger can be approved only if it is accompanied by complete divestiture of overlapping AT&T assets in the SBC region, including customers as well as network facilities. This is needed to enable an alternative carrier to emerge and replicate the competitive presence of AT&T. The mere fact that SBC is attempting these anticompetitive measures provides clear evidence of the competitive and regulatory vacuum created by the elimination of AT&T. In addition, other conditions are needed to limit SBC's ability to prevent other rivals from developing the scale and scope to replace the competition lost by the capture of AT&T.

SBC's anticompetitive conduct also undercuts its primary justifications for the merger. SBC has gone to great lengths in this proceeding to argue that the availability of third-party network facilities to competitive carriers should assuage the obvious competitive concerns arising from the merger. Even if the Commission were to accept SBC's premise, it is clear that SBC's recent actions preclude (or make exceedingly difficult) competitive carriers' use of any third-party facilities to compete against the combined SBC/AT&T. Commission action, therefore, is vital to prevent SBC from having it both ways. SBC should not be able to claim that the supposed availability of third-party network facilities justifies its merger while simultaneously engaging in anticompetitive conduct that prevents competitive carriers from

accessing and employing these third-party facilities to compete against the combined SBC/AT&T once the merger is completed.

The Commission has clearly articulated the burden of proof on applicants for authority to merge. Under Sections 214(a) and 310(d) of the Act, “[a]pplicants bear the burden of demonstrating that the proposed transaction is in the public interest,” taking into consideration the “broad aims of the Communications Act.”¹ This examination necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws.

In order to find that a merger is in the public interest, we must, for example, be convinced that it will enhance competition. A merger will be pro-competitive if the harms to competition – *i.e.*, enhancing market power, slowing the decline of market power, or impairing this Commission’s ability properly to establish and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to deregulation – are outweighed by benefits that enhance competition. If applicants cannot carry this burden, the applications must be denied.²

If the Commission is to approve this merger, it must take steps to ensure that competition is “enhanced” – notwithstanding SBC’s elimination of its primary rival. In the past the Commission has conditioned mergers on safeguards that would remedy existing anticompetitive problems that are likely to have even more harmful effects in the future post-merger. For example, due to concerns that the merging ILECs’ existing actions to harm CLECs would likely grow worse post-merger, the Commission imposed a host of conditions on SBC/Ameritech and Bell Atlantic/GTE to remedy these pre-merger and post-merger problems. Of course, the proposed SBC/AT&T merger is even more serious than these ILEC/ILEC mergers because it eliminates an existing in-region competitor. Similarly, in the AOL/Time Warner merger proceeding, the Commission imposed conditions to prevent AOL from leveraging its dominance over instant messaging services into broader market power after merging with Time Warner, a leading facilities-based broadband provider.

¹ *In the Applications of NYNEX Corporation and Bell Atlantic Corporation, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987 ¶ 2 (1997).

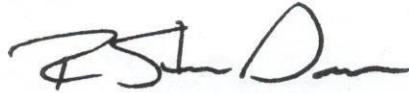
² *Id.* (emphasis added).

Chairman Kevin J. Martin
September 27, 2005

Page 4

In sum, before acting on the SBC/AT&T merger, the Commission must assure itself and the public that it has taken all steps necessary to ensure that this extraordinary transaction does not violate the Communications Act. The SBC conduct discussed in this and the attached letter underscores the gravity of the issue and the importance of the Commission's task.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Steven Davis". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

R. Steven Davis
Senior Vice President-Public Policy
Qwest

Attachment (Confidential pursuant to Protective Order, 20 FCC Rcd 5196 (2005))

Copy to:
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein